WEI HONG PING v. PP

COURT OF APPEAL, PUTRAJAYA
HADHARIAH SYED ISMAIL JCA
SEE MEE CHUN JCA
HASHIM HAMZAH JCA
[CRIMINAL APPEAL NO: B-05-165-04-2021]
3 OCTOBER 2022

Abstract – (i) *The defence of innocent carrier has to be examined in light of the doctrine of wilful blindness. A conviction of the accused is rendered safe if the accused has failed to make necessary inquiries and instead turn a blind eye to what is obvious and is proven to have had knowledge of the drugs found in the bag carried by the accused; (ii) with the provision of s. 39B(2A) of the Dangerous Drugs Act 1952, the mandatory death sentence is no longer the only sentence available in court. The court has a discretion to substitute a death sentence with that of life imprisonment.*

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in methamphetamines – Appeal against conviction and sentence – Defence of innocent carrier – Doctrine of wilful blindness – Whether accused had knowledge of drugs – Whether conviction safe – Whether death sentence ought to be substituted with life imprisonment – Dangerous Drugs Act 1952, s. 39B(2A)*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Trafficking in dangerous drugs – Defence of innocent carrier – Doctrine of wilful blindness – Whether accused had knowledge of drugs – Whether conviction safe – Whether death sentence ought to be substituted with life imprisonment*

The accused was charged for the offence of drug trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). On 13 November 2014, PW2 and his team, while monitoring the KLIA 2 International Arrival Hall, saw the accused, a Chinese national, with a handbag walking towards the door while pulling a brown bag. The accused appeared suspicious. PW2 approached the accused and her bag was subsequently scanned at the customs scanning machine where no suspicious image was detected. The accused, who appeared agitated, was then ordered to the Narcotics Office at KLIA where a physical examination was done on her, but nothing was found. PW2 then opened the bag and saw women's clothes and shoes. The bottom cover of the bag, which was zipped, was opened and under the cover was another cover with a black plastic containing crystal-coloured substances. All the items discovered were seized, including a Nokia and Samsung handphone. The crystalline substance was sent to the chemist for analysis, and it was

A confirmed to be 1457.8 grams of methamphetamine. The High Court Judge ('HCJ') found (i) that the accused had ownership and control of the drugs as she was walking alone while pulling the bag and there was no one else with her and that some of the clothes in the bag fitted and matched the body of the accused; (ii) the manner and condition of the drugs found in the bag by B modifying the space and concealing it and the panic state of the accused showed knowledge; (iii) trafficking had been proved as the accused had arrived from Hong Kong and was exiting the arrival hall of KLIA 2 with the bag which amounted to an act to distribute. The large quantity of drugs would carry the inference of trafficking as opposed to own use. The accused, C in her defence, submitted that she had met a black Nigerian man named Yaya through social media, who had offered her a job to bring clothes and shoes abroad for RMB2000. On 12 November 2014, the accused claimed that she was given the brown bag which she had opened to check and found that there were clothes and shoes. Yaya informed her that the clothes and shoes were samples to be sent to his friend in Malaysia. The accused then departed for D Malaysia where she was arrested. The HCJ found the (i) denial of knowledge of the drugs found in the bag was a defence of innocent carrier which went hand in hand with the doctrine of wilful blindness; (ii) Yaya was but a fabrication of the accused; and (iii) the accused failed to raise any reasonable doubt on the prosecution's case. The accused was thus found guilty and E convicted of the charge against her and was sentenced to death. The accused, in her appeal against the said decision, raised the issue that there had been a failure to appreciate the defence that the accused did not have knowledge of the drugs and that she was an innocent carrier. It was also the accused's submission that the prosecution had failed to negate the existence of Yaya F where there had been a failure to produce the Samsung handphone where their communication through WeChat could be found as well as Yaya's telephone number along with photographs of the both of them together.

Held (dismissing appeal on conviction; setting aside death sentence and substituting it with life imprisonment)

G **Per See Mee Chun JCA delivering the judgment of the court:**

(1) The HCJ had to determine whether that person who is supposed to be the true trafficker is a real person or not. This was indeed determined by the HCJ who ultimately found that the accused knowing Yaya was 'hanya satu rekaan cerita dongeng sahaja' and that Yaya was 'hanya satu H rekaan tertuduh sahaja.' The information on Yaya, or rather the lack of it, not only went to the reasonableness of the accused's narration of Yaya but it was also not sufficient for the police to investigate and determine the existence of Yaya. This was not an *Alcontara* notice. There was really nothing much for the prosecution to investigate on the Samsung I when there were no details on Yaya. Evidence also showed the accused to have possession of the bag where the drugs were found and PW4's

evidence that there was no foreign DNA on the clothes seized. The DNA of the accused was found on the clothes seized. (paras 25, 27 & 31)

(2) The defence of innocent carrier has to be examined in the light of the doctrine of wilful blindness. The accused had failed to make the necessary inquiries and instead turned a blind eye to what was obvious. The turning of a blind eye was in relation to the delivery of the bag which consisted of inexpensive samples of clothes and shoes, but the accused was to be paid a lucrative sum. Such delivery was to a friend of Yaya whose name, address and other details were unknown. In relation to Yaya, this had been considered when dealing with whether he existed and that there was no information on him, other than his name. (paras 33-36)

(3) Reference was also made to the drugs being hidden in the bag that the accused could not have known of the drugs. This was put paid by the HCJ that if that were so, liability would be escaped by merely ensuring that the drugs were hidden. There was no reason to depart from the finding of the HCJ. The HCJ did not err in finding that Yaya was a fictitious person. The HCJ had also considered all aspects of the defence of innocent carrier, wilful blindness and whether it could be said that the accused had no knowledge of the drugs in the bag. The conviction of the accused was safe. (paras 39 & 40)

(4) With the provision of s. 39B(2A) of the DDA, the mandatory death sentence is no longer the only sentence available in court. The court has a discretion to impose a sentence of life imprisonment. Here, the HCJ, without more, only stated that the accused's case did not fall under s. 39B(2A). In the circumstances, this court exercised its discretion given under s. 39B(2A) of the DDA. Thus, this court affirmed the conviction of the accused and substituted the death sentence with that of life imprisonment. (paras 43-45)

Case(s) referred to:

Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Ali Hosseinzadeh Bashir v. PP [2015] 1 CLJ 918 CA ***(refd)***
Maria Elvira Pinto Exposto v. PP [2020] 5 CLJ 1 FC ***(refd)***
Munuswamy Sundar Raj v. PP [2016] 1 CLJ 357 FC ***(refd)***
Taja Tarji & Herman v. PP (05[M]-98-09-2020(J) (Unreported) ***(refd)***
Teh Hock Leong v. PP [2008] 4 CLJ 764 CA ***(refd)***
Tiang Shi Chye lwn. PP [2020] 1 LNS 506 HC ***(refd)***
Tobechi Chinonso Madu v. PP [2015] 1 LNS 57 CA ***(refd)***
Yee Wen Chin v. PP & Another Appeal [2008] 6 CLJ 773 CA ***(refd)***
Zulfikar Mustaffah v. PP [2001] 1 SLR 633 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 39B(2A)

For the appellant - Gooi Soon Seng & Choong Kak Sen; M/s Gooi & Azura
For the prosecution - Atiqah Abdul Karim; DPP

[Editor's note: For the High Court judgment, please see PP lwn. Wei Hong Ping [2021] 1 LNS 2477 (overruled in part).]

Reported by Suhainah Wahiduddin

JUDGMENT

See Mee Chun JCA:

Introduction

[1] The accused/appellant was charged as follows:

> Bahawa kamu pada 13.11.2014 lebih kurang 1.30 pagi di Balai Ketibaan Antarabangsa, KLIA 2 Sepang, Dalam Daerah Sepang, Di dalam Negeri Selangor Darul Ehsan, didapati mengedar dadah berbahaya jenis methamphetamine seberat 1457.8 gram. Oleh yang demikian itu, kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan bleh dihukum di bawah seksyen 39B(2) Akta Dadah Berbahaya 1952.

At the conclusion of trial, the accused was convicted and sentenced to death by the High Court.

[2] The accused appealed against the conviction and sentence. We dismissed the appeal on conviction but allowed that on sentence where we set aside the death sentence and substituted it with life imprisonment. We now give our reasons.

Prosecution Case

[3] On 13 November 2014 at around 1.30am, Sergeant Mohd Ghazali bin Idris (PW2) and his team were on duty monitoring the KLIA 2 international arrival hall at the area between the carousel and customs inspection. He saw the accused with a handbag walking towards the door and pulling a brown bag ("the bag"/P12). The accused appeared suspicious and was looking left and right while stopping to look around.

[4] PW2 approached the accused, introduced himself as a policeman and asked for her passport. The particulars revealed her as Wei Hong Ping, a Chinese national. The luggage tag on the bag indicated the accused travelled from Hong Kong to Kuala Lumpur on flight AK131.

[5] The bag was scanned at the customs scanning machine where no suspicious image was detected. The accused appeared agitated and was then ordered to the Narcotics Office at KLIA. A female lance corporal did a physical examination on the accused and found nothing.

[6] PW2 then opened the bag witnessed by police personnel and the accused. Women's clothes, a few pair of shoes and an orange plastic bag containing women's underwear were found. When the items were removed, PW2 lifted the bag and found it heavy. He then lifted the bottom cover of the bag and it was zipped. It was then opened and under the cover was another cover with a black plastic (P19A) containing crystal-coloured substances suspected to be drugs. This was shown to the accused and it was explained to her in simple English what was found. The accused did not say anything and appeared panicky. The handbag (P13) was inspected and there was a small flowery wallet. There was also a boarding pass in the name of the accused and a Nokia and a Samsung handphones. PW2 arrested the accused and all the items were seized. The accused and the seized items were brought to the Selangor IPD and handed over to the investigating officer, Inspector Amri bin Mohd Arif (PW4).

[7] The crystalline substance was sent to the chemist for analysis and confirmed to be 1457.8g of methamphetamine.

Finding At The Close Of The Prosecution Case

[8] The High Court Judge (HCJ) found that the crystalline substance found in the bag carried by the accused was confirmed by the chemist (PW3) to be 1457.8g of methamphetamine. This was not challenged by the defence. Methamphetamine is a scheduled drug under the Dangerous Drugs Act 1952 (DDA).

[9] The HCJ found that the accused had ownership and control of the drugs as she was walking alone while pulling the bag and there was no one else with her. Some of the clothes in the bag fitted and matched the body of the accused. This was proved by way of "ujipakai" done by PW4. The bag tag with the serial number 080717482 in the name of the accused with flight number AK131 matched that of the boarding pass and luggage claim found in the handbag.

[10] The manner and condition of the drugs found in the bag by modifying the space and concealing it, showed knowledge. The agitation and panic state of the accused showed knowledge too. *Teh Hock Leong v. PP* [2008] 4 CLJ 764 and *Ali Hosseinzadeh Bashir v. PP* [2015] 1 CLJ 918 were cited for the proposition that the drugs being hidden from view does not mean the accused could not have known of the presence of the drugs.

[11] Trafficking had also been proved as the accused had arrived from Hong Kong and was exiting the arrival hall of KLIA 2 with the bag. This amounted to an act to distribute similar to *Munuswamy Sundar Raj v. PP* [2016] 1 CLJ 357; [2015] 6 MLJ 214. The large quantity of drugs would carry the inference of trafficking as opposed to own use.

[12] There had been no failure to investigate a person named Yaya as referred to in the cautioned statement (D23) which had prejudiced the accused. The HCJ considered there had been no complete details of Yaya, who is said to be the owner of the drugs, for the police to investigate. It was not a sufficient notice under the *Alcontara* notice principle as per *Tiang Shi Chye lwn. PP* [2020] 1 LNS 506. The same too for the failure to investigate the contents of the Samsung handphone.

[13] The HCJ found the prosecution had made out a *prima facie* case against the accused in respect of the charge. The accused was called to enter upon her defence.

The Defence Of The Accused

[14] The accused gave evidence under oath through her witness statement. She is from Guangdong, China and worked as a shop assistant in a picture making frame shop. Through social media, she came to know a black Nigerian man, by the name of Yaya. She then met him at a restaurant. There, Yaya offered her a job to bring clothes and shoes abroad for RMB2000. The accused accepted the job and went to Indonesia at the end of 2013 with all expenses paid by Yaya. Upon her return from Indonesia, she has met Yaya once in April 2014 and they communicate through social media.

[15] In October 2014, Yaya asked the accused to send clothes and shoes to Malaysia for which she would be paid RMB4000. On 30 October 2014, the accused met Yaya and handed her passport for visa and other purposes. On 11 November 2014, Yaya informed the accused that his friend would come over on 12 November 2014 to hand the items, her passport and return flight ticket with 200 dollars cash.

[16] On 12 November 2014, the bag, which is brown in colour, was handed over. The accused opened the bag to check and found clothes and shoes and she put her clothes inside. Yaya informed the accused that the clothes and shoes were samples to be sent to his friend in Malaysia. He gave her the phone number which the accused saved in the handphone.

[17] The accused departed for Malaysia where the events as narrated above leading to her arrest unfolded.

Finding At The End Of Trial

[18] The HCJ found the denial of knowledge of the drugs found in the bag was a defence of innocent carrier which goes hand in hand with the doctrine of wilful blindness. The HCJ examined the evidence and found it impossible that the accused did not have knowledge and that the explanation given was not reasonable. This was set forth in paras. 42 and 43 of the grounds. The version of the accused was said to be very unreasonable and more of "satu dongengan" (para. 46).

[19] The HCJ did not believe that Yaya existed and the reasons were elaborated in paras. 51 and 52. The information about Yaya which was given by the accused, did not meet the requirements of a notice as required by *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705; [1996] 1 MLJ 209. In short, Yaya was but a fabrication of the accused.

[20] The HCJ did not believe that the handphone numbers of Yaya and his friend had been kept in the Samsung handphone.

[21] There had been wilful blindness where the accused turned a blind eye to the obvious. Refer to para. 49 of the grounds.

[22] The accused had failed to raise any reasonable doubt on the prosecution case. The HCJ found the prosecution had proved its case beyond reasonable doubt. The accused was found guilty and convicted of the charge against her. As the case did not fall under s. 39B(2A) of the DDA, the accused was sentenced to death.

The Appeal

[23] At the appeal, the accused raised the issue that there had been a failure to appreciate the defence that the accused did not have knowledge of the drugs and that she was an innocent carrier. Yaya was said to be a fictitious character where the HCJ's reasoning of the communication between Yaya and the accused was based on conjecture. The prosecution had failed to negate the existence of Yaya where there had been a failure to produce the Samsung handphone where the communication through WeChat can be found as well as Yaya's telephone number along with photographs of the both of them together.

Our Decision

[24] The thrust of the contention of the accused was that she was an innocent carrier being used by Yaya who is the actual trafficker. Reference to *Yee Wen Chin v. PP & Another Appeal* [2008] 6 CLJ 773 was made at p. 784 as follows:

> [12] … The defence quite properly took advantage of this fact to demonstrate that Woo was the real trafficker and that the accused was entirely innocent. The accused was clearly entitled to do this in view of the decision in *Mohamad Radhi v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC. That case is authority for the proposition that a person charged with trafficking is entitled to an acquittal on that charge by showing that he was a mere possessor of the drugs whilst another was the true trafficker. Whenever such a defence is taken two separate exercises must be carried out by the trial judge. He must first determine as a fact whether that either is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. Next, if he finds that other person to be real, the judge must then determine whether

A that other person is the real trafficker. This is called the Radhi direction and must be administered by a court unto itself when such a defence is taken. See, *Sachima Okoye v. Public Prosecutor* [1995] 3 CLJ 371 CA.

[25] We have no issue with the proposition that the HCJ has to determine whether that person who is supposed to be the true trafficker, is a real person B or not. This was indeed determined by the HCJ who ultimately found that the accused knowing Yaya was "hanya satu rekaan cerita dongeng sahaja" (para. 51) and that Yaya was "hanya satu rekaan tertuduh sahaja" (para. 53). The HCJ simply did not believe that Yaya existed. We find that the HCJ buttressed his finding in paras. 51 and 52 as follows:

C [51] Mahkamah ini sukar untuk mempercayai akan kewujudan Yaya yang semasa SP2 diperiksa balas, peguambela ada mempersoalkan Bahasa yang digunakan oleh SP2 ketika berkomunikasi dengan Tertuduh yang menurut SP2 dalam Bahasa Inggeris yang mudah. Tetapi diletakkan kepada SP2 kenapa SP2 tidak menggunakan seorang jurubahasa Cina dalam berkomunikasi dengan Tertuduh. Jelas daripada ini menunjukkan D Tertuduh tidak memahami Bahasa Inggeris. Semasa memberi keterangan Mahkamah tidak dapat melihatkan Tertuduh memahami Bahasa Inggeris mahupun yang mudah. Oleh itu adalah tidak munasabah langsung Tertuduh mengenali Yaya melalui media Bahasa dengan menggunakan Bahasa Cina. Tentunya Yaya yang warganegara Nigeria akan E menggunakan Bahasa Inggeris dalam komunikasinya dalam media Bahasa tersebut. Mahkamah ini amat meragui bagaimana Tertuduh boleh mengenali Yaya. la hanya satu rekaan cerita dongeng Tertuduh sahaja.

S: Dan kau juga setuju dengan saya apa yang kau cakap dalam bahasa Inggeris itu dia pun tak faham, betul tak seperti ayam bercakap dengan itik.

F

J: Betul.

[52] Perwatakan individu yang bernama Yaya yang dikenali melalui laman sosial. Walau bagaimanapun Tertuduh pernah beberapa kali berjumpa dan tempoh perkenalannya selama 3 bulan dan Yaya berjanji untuk berkahwin G dengan Tertuduh. Tertuduh menganggap Yaya adalah teman lelakinya. Adalah mustahil dalam keadaan sebegini Tertuduh tidak mengetahui butir-butir lengkap Yaya. Tertuduh dalam keterangannya dan dalam percakapan beramarannya Tertuduh tidak dan gagal menyatakan butir lanjut berkenaan penama Yaya tersebut. Yaya merupakan orang yang memberi pekerjaan kepada Tertuduh dan menanggung segala H perbelanjaan membawa sampel-sampel baju dan kasut keluar negeri tentunya sebagai seorang yang munasabah akan mendapatkan butir-butir Yaya tidak hanya sekadar nama Yaya sahaja. Lebih-lebih lagi perkenalan yang Tertuduh hanya melalui laman sosial tentunya lebih kewajaran dalam hal keadaan sebegini mengkehendaki Tertuduh mendapatkan butir lengkap Yaya, bagi mengelakkan Tertuduh dipergunakan atau ditipu. I Kegagalan memberi butir-butir ini bukan sahaja menjurus kepada ketidak munasabah penceritaan Tertuduh malah mengecewakan pihak polis untuk menyiasat dalam mempastikan kewujudan Yaya tersebut. Maklumat

mengenai Yaya ini tidak memenuhi kehendak sebagai satu notis kepada Pihak Pendakwaan mengikut kes *Alcontara Ambros Anthony v. PP* [1996] 1 MJL 209. Kewujudan Yaya tidak pernah dibuktikan oleh Perayu (*Luo Wenqin v Pendakwa Raya* [2019] 1 LNS 517; *Ismayilova Namid Qizi Irada v. PP* [2016] 1 LNS 20; *Tobeichi Chinonso Madu v. PP* (*supra*); *Ali Hosseinzaldeh Bashir v. PP* (*supra*).

[26] Such reasoning as set out above are cogent and we find no grounds to depart from them. The HCJ had reasoned that the accused had met Yaya through social media. If indeed the accused had met Yaya several times and they were to be married, then it was not possible for her not to have any details on Yaya. What the accused had was only the name of Yaya. This was coupled with Yaya having borne all the expenses for her trip to Malaysia. This is borne out by the questions and answers in her cautioned statement (encl. 13/66) as follows:

S Adakah pakaian yang terkandung dalam beg bagasi warna coklat tersebut milik kamu?

J Ada beberapa pakaian milik saya yang lain adalah milik rakan saya nama Yaya

S Milik siapa beg basai warna coklat jenama Dashentu bertag No 0807174826 No Flight AK 131 atas Nama Wei/HongPing yang kamu bawa?

J Milik seorang rakan saya bernama Yaya. Beg tersebut adalah untuk dikirim kepada seseorang di Malaysia yang saya sendiri tidak tahu kerana Yaya hanya beritahu saya ia hanyalah sampel pakaian dan kasut.

S Siapa Yaya?

J Seorang lelaki Nigeria yang saya kenali sejak dari tahun 2013 melalui Laman Sosial.

S Bagaimana kamu kenali Yaya?

J Dia merupakan kenalan saya melalui Laman sosial, dan saya hanya berjumpa dengannya selepas 3 bulan mengenalinya.

S Berapa kali kamu pernah berjumpa dengan Yaya?

J Saya hanya berjumpa beberapa kali dengannya sahaja selama kami berkenalan.

S Bagaimana kamu berhubung dengan Yaya?

J Biasanya melalui panggilan telefon Yaya.

S Boleh kamu ceritakan bagaimana ciri-ciri Yaya yang kami maksudkan?

J Seorang lelaki kulit hitam, tinggi dan warga Nigeria.

S Apa nombor telefon Yaya untuk berhubung dengan kamu?

J Saya tidak ingat kerana Yaya selalu tukar-tukar nombor telefon untuk menghubungi saya.

[27] From the above, it can also be seen that the information on Yaya, or rather the lack of it, not only went to the reasonableness of the accused's narration of Yaya but it was also not sufficient for the police to investigate and determine the existence of Yaya. This was not an *Alcontara* notice. The HCJ had correctly referred to an earlier decision of this court in *Tobechi Chinonso Madu v. PP* [2015] 1 LNS 57; [2015] MLJU 2038 as follows:

> [16] The mere fact that Ossy's name was mentioned during the police investigation is not evidence that Ossy actually exists. How were the police to investigate the existence of this person when the appellant did not even give his full name and his residential address? The poor investigating officer may end up chasing a wild goose. We therefore found no merit in the appellant's argument that the police's failure to investigate the existence of Ossy must be held against the prosecution.

[28] By the same token, the police cannot be faulted for not having investigated Yaya given the paucity of information.

[29] It was further contended that the HCJ had misdirected himself and made a conjecture that Yaya would use English as a mode of communication. Such a contention is misplaced as evident from the evidence of the accused referred to above and which is repeated here:

> S: Dan kau juga setuju dengan saya apa yang kau cakap dalam bahasa Inggeris itu dia pun tak faham, betul tak seperti ayam bercakap dengan itik,
>
> J: Betul.

[30] The next contention was that all the details or information on Yaya such as the conversations between the accused with him on WeChat, his handphone number and photographs of them, were in the Samsung handphone. The handphone was not produced in court and had gone missing after its seizure. It had also been not sent for forensic examination. PW4 (the investigating officer) had not investigated the handphone numbers in the Samsung as it only contained foreign numbers. The onus was on the prosecution to check the existence of Yaya and all these meant the accused had lost a chance to be acquitted.

[31] The above contention had been considered by the HCJ when it was said that there really was nothing much for the prosecution to investigate on the Samsung when there were no details on Yaya (para. 24). This has to be read together with para. 25 where the evidence showed the accused to have possession of the bag where the drugs were found and PW4's evidence that there was no foreign DNA on the clothes seized. Although the defence contended what PW4 said was "saya silap bila cakap tiada DNA asing tapi ada DNA OKT" (Vol 2(1)/67), the fact remained the DNA of the accused was found on the clothes seized.

[32] The HCJ had also noted that the information on Yaya was not sufficient for the police to investigate and determine the existence of Yaya. A

[33] We agree with the HCJ that the defence of innocent carrier has also to be examined in the light of the doctrine of wilful blindness. In *Maria Elvira Pinto Exposto v. PP* [2020] 5 CLJ 1 this was said at p. 17: B

> [41] The law only requires the accused to inspect or enquire when reasonable cause for obvious suspicion arises, and if the accused takes no step or effort to dispel this lingering suspicion then he or she is presumed to have known and accepted the risk of that suspicious endeavour. The facts of this case do not warrant the application of the doctrine of wilful blindness to the appellant. The appellant could not be said to have shut her eyes to the obvious when there was nothing or even remotely suspicious to begin with. C

[34] At para. 48 of our instant case, the HCJ said this:

> [48] Doctrine "wilful blindness" (kebutaan yang disengajakan) boleh dirumuskan sebagai terpakai kepada situasi dimana hal keadaan yang menimbulkan kecurigaan yang cukup kepada seorang yang munasabah untuk membuat pertanyaan (inquiry) akan kesalahan sesuatu transaksi tertentu. Dengan kata lain, sekiranya keadaan itu ada menimbulkan syak wasangka adalah menjadi kewajipan Tertuduh untuk membuat pertanyaan yang perlu bagi memuaskan hatinya ketulinan atau kebenaran tentang apa yang dimaklumkan kepadanya. Sekiranya ia gagal berbuat demikian, maka Tertuduh bersalah atas kebutaan yang disengajakan [*PP v. Halina Purnama Sari* (*supra*) dirujuk]. Seterusnya kegagalan itu merupakan perbuatan yang disengajakan kerana tidak membuat pertanyaan. D E

[35] The facts as found by the HCJ in para. 49 showed that the accused had failed to make the necessary inquiries and instead turned a blind eye to what was obvious. This was how it was analysed by the HCJ: F

> [49] Dalam kes ini Tertuduh baru sahaja mengenali Yaya. Kebanyakkan perhubungan melalui sosial dan telefon dan beg tersebut diserahkan kepada Tertuduh melalui seorang lelaki Nigeria yang tidak dikenalinya. Malah Yaya juga tidak diketahui akan butir-butir lengkapnya oleh Tertuduh. Beg yang hendak dihantar kepada seseorang di Malaysia. Barang yang hendak dihantar hanya merupakan sampel beberapa pakaian dan kasut yang murah tetapi dengan upah yang begitu lumayan diberi oleh Yaya serta kos-kos lain ditanggung oleh Yaya. Beg tersebut berada dalam kawalan dan jagaan Tertuduh sepanjang pagi dan petang 1.11.2014. Penyerahan beg dengan sampel pakaian dan kasut kepada kawan Yaya yang tidak diketahui nama, butir-butir lain serta alamat yang dihantar. Kesemua perkara ini sewajarnya memberi syak kepada Tertuduh, jika benar beg tersebut diserahkan oleh Yaya kepada Tertuduh, untuk Tertuduh membuat pertanyaan akan kandungan dan perkara sebenar disebalik penghantaran kasut dan pakaian tersebut Tetapi Tertuduh gagal berbuat demikian dengan sengaja membutakan matanya pada perkara-perkara yang jelas. G H I

[36] The turning of a blind eye was in relation to the delivery of the bag which consisted of inexpensive samples of clothes and shoes, but the accused was to be paid a lucrative sum. Such delivery was to a friend of Yaya whose name, address and other details are unknown. In relation to Yaya, this has been considered when dealing with whether he existed and that there was no information on him, other than his name.

[37] The HCJ had also stated in para. 40 that innocent carrier refers to a situation where the accused admits to carrying the bag containing the drugs but denies having knowledge that the drugs are in the bag. This was next said in para. 42 as follows:

> [42] Mahkamah ini mendapati tidak mungkin Tertuduh tidak mengetahui akan dadah-dadah berbahaya di dalam beg tersebut (P12) tersebut. Penceritaan Tertuduh tidak munasabah mengenai:
>
> (a) Yaya memberi upah Renminbi 4000 dan menanggung segala perbelanjaan yang banyak, membuat visa, tiket penerbangan dan penginapan Tertuduh semata-mata untuk membawa sample baju dan kasut yang Tertuduh sendiri akui merupakan barang-barang yang murah. Adalah lebih munasabah sampel pakaian dan kasut jika ia tujuannya untuk dijual adalah lebih murah dan patut diperkenalkan melalui media sosial yang kebanyakkan dilakukan oleh mereka-mereka yang berniaga secara "online";
>
> (b) Tidak mungkin penceritaan Tertuduh bahawa kawan Yaya seorang lelaki Nigeria menyerahkan beg tersebut kepada Tertuduh tanpa penjelasan bagaimana lelaki Nigeria itu mengenali dan mengetahui tempat tinggal Tertuduh. Baik keterangan Tertuduh mahupun dalam percakapan beramaran tidak menjelaskan keadaan ini. Pada hemat Mahkamah perwatakan lelaki Nigeria ini segaja diwujudkan bagi menunjukkan bahawa Tertuduh tidak mempunyai kesempatan untuk bertanya dengan Yaya;
>
> (c) Penceritaan Tertuduh beg kitar semula yang dibawa bersama yang akan digunakan untuk membawa pakaiannya balik ke negeri China selepas barang itu diserahkan kepada seseorang, telah tidak pernah ditimbulkan semasa saksi SP2 memberi keterangan dan tidak pernah dijumpai dalam beg bagasi semasa SP2 memberi keterangan menunjukkan Tertuduh cuba mereka-reka cerita, serta menunjukkan beliau sudah mengetahui kandungan beg tersebut;
>
> (d) Ketiadaan butir-butir penerima barang turut menimbulkan keraguan dan kesangsian akan cerita Tertuduh mengenai pengetahuannya. Tertuduh sendiri mengaku tidak tahu siapa penerima beg di Malaysia. Adalah mustahil tujuan Tertuduh seperti yang diceritakan bagi menyerahkan sample-sample pakaian dan kasut kepada kawan Yaya yang Tertuduh sendiri tidak mengetahuinya, kecuali fakta itu menunjukkan bahawa Tertuduh mengetahui wujudnya dadah di dalam beg bagasi itu untuk diedarkan kepada pihak ketiga yang diketahui sendiri oleh Tertuduh; dan

(e) Tertuduh mengemukakan pembelaan bahawa dadah dijumpai tersembunyi di dalam beg dan beliau tidak boleh mengetahui kewujudan dadah tersebut. Alasan ini tidak boleh diterima, sekiranya ia diterima pengedar dadah berbahaya boleh mengedar dadah berbahaya dengan cara menyembunyikan dadah tersebut di dalam beg yang dibawa mereka dan terlepas dari tindakan pihak berkuasa dan pendakwaan atas alasan dadah berbahaya tersebut tersembunyi dan tidak dapat dilihat dengan mata kasar. Mahkamah merujuk apa yang dikatakan oleh Abdul Rahman Sebli Hakim Mahkamah Rayuan dalam kes *Ali Hosseinzaldeh Bashir v. PP* (*supra*).

[38] We again find no reason to depart from the finding of the HCJ. The most telling is that the clothes and shoes to be brought over to Malaysia were, as even admitted by the accused, not expensive and it was more reasonable these samples be introduced online. Instead, Yaya had to bear all costs incurred such as payment of RMB4000 to the accused, the flight ticket, visa fee and accommodation, just so that the samples be brought over physically.

[39] Reference was also made to the drugs being hidden in the bag such that the accused could not have known of the drugs. This was put paid by the HCJ that if that were so, liability would be escaped by merely ensuring that the drugs are hidden. This was indeed the principle stated in *Ali Hosseinzadeh* cited by the HCJ. There, the court expressed surprise that the contention that since the drugs were hidden from view, the appellant there could not have known of their presence. It referred to the Singapore Court of Appeal case in *Zulfikar Mustaffah v. PP* [2001] 1 SLR 633 that "while the content of the bundles was hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should not be given too much weight. Otherwise, drug peddlers could escape liability ... Rather the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible". As duly noted by the HCJ, the fact of the matter is that it all depends on the facts and circumstances of the case.

[40] We therefore find that the HCJ did not err in finding that Yaya was a fictitious person. The HCJ had also considered all aspects of the defence of innocent carrier, wilful blindness and whether it could be said the accused had no knowledge of the drugs in the bag. We find that the conviction is safe and we dismiss the appeal on conviction.

Sentence

[41] We would, however, set aside the death sentence and substitute it with life imprisonment.

[42] Section 39B(2A) DDA provides as follows;

(2A) In exercising the power conferred by subsection (2), the Court in imposing the sentence of Imprisonment for life and whipping of not less than fifteen strokes, may have regard only to the following circumstances:

A

(a) there no was no evidence of buying and selling of a dangerous drug at the time when the person convicted was arrested;

(b) there was no involvement of agent provocateur; or

(c) the involvement of the person convicted is restricted to transporting, carrying, sending or delivering a dangerous drug; and

B

(d) that the person convicted has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia.

[43] With this provision, the mandatory death sentence is no longer the only sentence available to the court. The court has a discretion to impose a C sentence of life imprisonment. This is on the high authority of the Federal Court in *Taja Tarji & Herman v. PP* (05[M]-98-09-2020(J)) where there can be an exercise of discretion in the light of s. 39B(2A) of the DDA.

[44] Here, the HCJ, without more, only stated that the accused's case did not fall under s. 39B(2A). In the circumstances of the case, we exercised our D discretion given under s. 39B(2A) of the DDA.

Conclusion

[45] For the above reasons, we affirmed the conviction and substituted the death sentence with that of life imprisonment.

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